

11 October 2016

## EXPLANATORY MEMORANDUM ON EUROPEAN UNION LEGISLATION AND DOCUMENTS

### Regulation of the European Parliament and of the Council establishing the Body of European Regulators for Electronic Communications

Submitted by the Department for Culture, Media and Sport on 11th October 2016.

#### 1. SUBJECT MATTER

1.1 This draft Regulation sets out Commission proposals for “establishing the Body of Regulators for Electronic Communications” (BEREC) to ensure a more effective regulatory institutional framework in order to make the telecoms rules fit for purpose as part of the creation of the right conditions for the digital single market. The Commission is explicit that the changing market and technological environment [in the sector] make it necessary to strengthen the institutional framework by *enhancing the role* of BEREC.

1.2 These proposals sit alongside the proposal for a Directive of the European Parliament and of the Council establishing the European Electronic Communications Code (Recast); SWD (2016) 305 final; COM(2016) 590; 2016/0288 (COD), of the 14th September 2016<sup>1</sup>. Those proposals are covered by EM 12252/16, some of which assign new tasks to BEREC, and, alongside that, also reference converting BEREC into an EU agency.

1.3 There is every likelihood the Code, including BEREC’s role in maintaining and enforcing it, will remain influential when the UK leaves the EU as, depending on the exit agreement, the Code will continue to apply to EEA countries and/or continue to place regulatory conditions on companies who continue to trade within Europe. It is in our interests to negotiate a Code, and the role for BEREC within it, that best delivers on Britain’s interests.

1.4 BEREC was established in its current form as a consequence of the last review of the Framework, resulting in Regulation (EC) No 1211/2009 of 25 November 2009 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Office (the 2009 Regulation). The 2009 Regulation will be revoked and replaced by the proposed Regulation. There were proposals at the time of the 2009 Regulation to establish BEREC as an agency of the EU, but the UK and other Member States resisted those proposals both on the basis of the additional resources those proposals would have necessitated and the potential ceding of national competence to an EU agency.

1.5 Proposals for this Regulation form part of the Commission’s Connectivity Package and are accompanied by the proposals for the new EU Electronic Communications Code (see footnote 1 above), with associated annexes<sup>2</sup>; Proposals for a Regulation of the European

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<sup>1</sup> ECC Directive: <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-590-EN-F1-1.PDF>

Parliament and the Council amending Regulations (EU) No 1316/2013 and (EU) No 283/2014 as regards the promotion of Internet connectivity in local communities<sup>3</sup> (EM reference number 12259/16); a Commission communication 5G for Europe: An Action Plan<sup>4</sup> (EM reference number 12279/16); and, a second Commission communication “Connectivity for a Competitive Digital Single Market - Towards a European Gigabit Society”<sup>5</sup>(EM reference number 12364/16) .

## **2. SCRUTINY HISTORY**

2.1 This specific set of proposals has not been considered by a Committee before. However, it is part of the Commission’s Digital Single Market Strategy, and the Department for Business, Innovation and Skills submitted EM 8672/15 on 15 June 2015 on “Communication from the Commission to the European Parliament , the Council, the European Economic and Social Committee and the Committee of the Regions - A Digital Single Market Strategy for Europe”. The House of Commons European Scrutiny Committee cleared it (Report of 25/11/2015). The Lords Select Committee on the EU cleared it (Letter of 14/10/2015).

2.2 We updated the House of Commons and the House of Lords EU Committees on the UK’s priorities for the Framework review before they were set out in a non-paper published in October 2015 and a response to the Commission’s consultation on the review in December 2015. The EU Electronic Communications Framework (now recast as a new Electronic Communications Code) aims to establish a harmonised framework for the regulation of electronic communications services (ECS), electronic communications networks, associated facilities and associated services, and certain aspects of terminal equipment. It regulates all transmission networks and services for electronic communications, including fixed and mobile telecommunications, some email, access to the internet and broadcasting transmission. The BEREC Regulation was one of the legal instruments forming part of that Framework.

2.3 Scrutiny history associated with this proposal:

15408/16, COM(07)699: Proposal for a Regulation of the European Parliament and of the Council establishing the European Electronic Communications Market Authority

BERR EM dated 10 December 2007.

ESC:Reported on the proposal on three occasions in Reports 6 & 40, 07/078 and Report 16, 08/09 and cleared the proposal on 22 April 2009

EUC: The proposal was sifted to Sub-Committee B for examination and was the subject of an inquiry report which was debated on 14 March 2008. The proposal was finally cleared on 13 May 2008.

## **3. MINISTERIAL RESPONSIBILITY**

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<sup>2</sup> Annexes to the Directive: <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-590-EN-F1-1-ANNEX-1.PDF>

<sup>3</sup> Promotion of internet connectivity in local communities: <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-589-EN-F1-1.PDF>

<sup>4</sup> 5G action plan: <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-588-EN-F1-1.PDF>

<sup>5</sup> Gigabit Society Communication: <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-587-EN-F1-1.PDF>

3.1 The Secretary of State for Culture, Media and Sport has primary responsibility. The Framework is part of the wider European Digital Single Market (DSM) Strategy, for which the Department for Business, Energy and Industrial Strategy has lead responsibility. The Secretary of State for Business, Energy and Industrial Strategy also therefore has an interest.

#### **4. INTEREST OF THE DEVOLVED ADMINISTRATIONS**

4.1 Although the regulation of electronic communications is a reserved matter, Scottish Ministers, Welsh Ministers and Northern Ireland Ministers have an interest and the devolved administrations have been consulted in the preparation of this EM.

#### **5. LEGAL AND PROCEDURAL ISSUES**

5.1 Legal basis: Article 114 TFEU

5.2 EP procedure: Ordinary legislative procedure

5.3 Voting procedure : Qualified majority voting

5.4 Impact on UK law ; As a Regulation , this proposal will become directly applicable in UK law. It will require little if any further implementing legislation. But since the Regulation concerns the establishment of an EU body, the practical impact on UK law will be very small.

5.5 Impact on Gibraltar: This proposal applies to Gibraltar.

5.6 Fundamental rights analysis: It is not considered that this proposal raises any issues of fundamental rights.

#### **6. APPLICATION TO THE EUROPEAN ECONOMIC AREA**

6.1 The proposal has relevance for the European Economic Area.

#### **7. SUBSIDIARITY**

7.1 These proposals consist of a Regulation, and so apply directly to, Member States. Currently BEREC operates in an expert and technical advisory capacity to the Commission. We are concerned that some of the proposals though not explicitly, represent erosion of Member State competence by the European Commission. The proposals contained in the draft Directive for the EU Electronic Communications Code and this Regulation is would represent a shift away from BEREC's unique selling point of harnessing expertise rooted in national markets.

The Commission has proposed a so-called "double lock" Commission veto on market remedies where BEREC agrees in its opinion with concerns the Commission has raised about proposed market access or price regulating remedies. Even proposals for a chair of BEREC serving four years with a potential extension to eight, could give the Commission leverage to propose a permanent chair under BEREC staff, as opposed to the current arrangement of a rotating one-year chair undertaken by an active NRA head.

#### **8. POLICY IMPLICATIONS**

##### **8.1 General**

8.1.1 On 23 June, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a

full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU.

8.1.2 The Government's Industrial Strategy aims to limit the uncertainty associated with our exit from the EU and to ensure our new relationship with the EU works for business. To this end we will play our full part in negotiations on this new Regulation.

8.1.3 The government set out the UK's position on the review of the Electronic Communications Regulatory Framework, including the BEREC Regulation, in a non-paper in October 2015<sup>6</sup> and its December 2015 response to the Commission's consultation.<sup>7</sup> The response noted that the Framework has largely been successful in achieving its aims, but that it must be made more flexible, future-proof and deregulatory, where possible. On BEREC we said we believe that it may be more appropriate to conduct a further review of BEREC before considering whether any changes might be necessary. The UK government remains open to further discussion on proposals regarding potential changes to BEREC and its operation.

8.1.4 We also noted the content of the 2013 report 'How to Build a Ubiquitous EU Digital Single Market' which considered the case for potential changes to BEREC. We agreed that institutional changes to BEREC are not demonstrably linked to greater consistency in regulation.

8.1.5 So far, we have identified the following policy implications on the Commission's proposals.

## **8.2 BEREC's status and constitution**

8.2.1 In its Communication of May 2015, "A Digital Single Market Strategy for Europe" ("the DSM Strategy"), the Commission signposted an ambitious overhaul of the regulatory framework for electronic communications. This communication, according to the Commission, also pointed out that the "changing market and technological environment in the electronic communications sector make it necessary to strengthen the institutional framework by enhancing the role of BEREC".

8.2.2 The functioning of BEREC was reviewed in December 2012 under review provisions in the 2009 Regulation. This review reported a clean bill of health in the way that it functioned and discharged its task in pursuit of Framework implementation, regulatory consistency across Member States, and completing the Single Market. Despite this, the Commission maintains there remains insufficient consistency across Member States' in relation to implementation of the existing Framework. The UK maintains that any issue here relates to the Commission not properly overseeing the application of regulation, rather than there being a need for a host of new tasks. It might also illustrate the case that NRAs are responding to the specificities of their national markets.

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<sup>6</sup> UK Non-Paper: Review of the Electronic Communications Regulatory Framework  
<https://www.gov.uk/government/publications/uk-non-paper-review-of-the-electronic-communications-regulatory-framework>

<sup>7</sup> <https://www.gov.uk/government/publications/response-to-review-of-the-electronic-communications-regulatory-framework>

8.2.3 Fundamental to the Commission's draft Regulation is the proposal to turn BEREC, incorporating what is currently the BEREC Office (based in Riga, and staffed by about 27 personnel) into into a fully fledged agency of the EU. BEREC itself is currently an advisory panel, a board of regulators, drawn from the Chief Executives of the NRAs. The BEREC Office is a Community Body with a legal identity, providing a programme management function, executive support function and an administrative and finance function. NRAs are a significant resource in the discharge of BEREC's specific roles and outputs and indeed the Commission asserts that "NRAs will continue to do most of the work relating to the implementation of the regulatory framework". Nonetheless, the UK retains concerns over the proposed expansion of the role of BEREC, and any plans to turn it into an EU agency.

8.2.4 By adding several extra regulatory functions, including potentially legally binding decisions, into the regulatory process and giving BEREC a legal identity which it does not currently possess, the Commission is looking to exercise a change of status which will give it more influence over BEREC operations. It is unclear how combining the Board of Regulators and the BEREC Office will work. The Board of Regulators and the NRA input into BEREC's work is currently addressed under the existing Framework where there is an obligation on Member States to ensure that NRAs are adequately resourced to input, in an advisory capacity, to BEREC's workload.

8.2.5 Obviously, if BEREC is responsible for potentially legally binding decisions in future it will not be able to work in the more ad hoc way it has until now. The Commission has already advanced outline proposals in its IA for a more than 100%+ increase in the existing BEREC staff complement. Although the IA does not explicitly say this, these staff are likely to come from the Commission which in turn would undermine the neutrality of the contribution from independent national regulators.

8.2.6 Among the proposed changes to BEREC governance are:

- a (renewable) 4-year term for the BEREC Chair, who is a serving NRA Head – this could be unfeasible given the length of national NRA terms and their inability to commit to govern BEREC for such a long time;
- a permanent executive director, selected from a Commission shortlist, who is the legal representative of BEREC – which risks undermining the Chair's control of BEREC;
- expert working groups chaired by permanent members of staff of the EU agency, rather than by NRA experts – eroding the link between BEREC outputs and national markets, which is the source of BEREC's value added input; and
- two Commission voting members of the governing board. We believe all these dilute BEREC's current neutral advisory status.

8.2.5 The Commission's rationale for the change of BEREC status is that it would lead to an enhanced role for BEREC in the field of electronic communications and that, by aiming to align its structure and governance, operation, programming and accountability with the Joint Statement of the European Parliament, the Council and the Commission on decentralised agencies of 19 July 2012 ('the Common Approach') they are ensuring that the proposal serves to support Union's priorities. This provides that all decentralised agencies must follow the same institutional structure.

8.2.6 While the Common Approach attempts to harmonise the structure and governance of all EU agencies, it does not require all bodies (such as BEREC) to become EU agencies. Indeed, only last year an EU-level decision-making body was established which did not follow the Common Approach (the European Data Protection Board). In any event, the

decentralised agency model is traditionally used to outsource tasks from the Commission to an agency (this explains the prescriptive rules in the Common Approach). There is no such outsourcing in the case of BEREC, rather the tasks simply involve the pooling of expertise of individual NRAs. Further, the Foreign and Commonwealth Office (FCO) have advised that the Common Approach is not legally binding.

### **8.3 BEREC's role**

8.3.1 According to the proposals, the new agency with a broader mandate, should continue the work of BEREC and continue the pooling of expertise from NRAs. The Commission acknowledges that, given that BEREC's brand identity is already well established and the not insignificant costs of changing its name, the new agency should retain the name of BEREC.

8.3.2 In proposals within the draft EU Electronic Communications Code, the Commission is proposing to assign a long list of new tasks to BEREC, which include emerging issues such as addressing regulation in cross border matters such as machine-to-machine (M2M) services or transnational demand for business users, where it feels BEREC has gained experience in ensuring a consistent implementation of the regulatory framework for these emerging technologies and issues. In the past, individual Member States have consulted BEREC, via the Commission, when issues such as these have emerged.

8.3.3 However, these are also to be augmented with a series of new processes, where additional authority is given to BEREC's interventions. The Commission's proposals set out further new tasks, such as:

- playing a greater role in the consultation mechanism for market regulatory remedies;
- providing guidelines for NRAs on geographical surveys;
- developing common approaches to meeting transnational end-user demand
- delivering opinions on draft national measures on assignments of rights of use for radio spectrum (the radio spectrum 'peer review'), and
- setting up a register on the extraterritorial use of numbers and cross-border arrangements and on providers of electronic communications networks and services.

8.3.5 As we have reported in the EM accompanying Commission proposals for a draft EU Electronic Communications Code we are particularly concerned about proposals to introduce a new "double lock" mechanism enabling the Commission to veto remedies if BEREC agrees with Commission concerns on remedies proposed by national regulatory authorities. There is little evidence to suggest this is justified. Further, available evidence suggests current procedures work and it is exceptional that NRAs do not take "utmost account of" BEREC opinions on proposed market remedies and intervention. We do not feel this proposal is properly and fully justified, it weakens potential NRAs authority to identify market specific remedies and potentially cedes power to the Commission. During the previous Review, the UK was not the only Member State to express serious reservations about, and to object to powers allowing the Commission to veto remedies.

8.3.6 However, the Commission has not provided real evidence of a need to change the role of BEREC (and by extension, the role of the Commission). The greater regulatory oversight afforded to BEREC under the Commission's proposal could be discharged without making any changes to the organisation, if the current rules were consistently applied.

8.3.7 This risks undermining the healthy and desirable tension between the Commission's purpose (to pursue its single market vision) and BEREC's (to ensure that that vision is

informed by the realities of the individual national markets, so that the Commission's initiatives work in practice).

#### **8.4 BEREC's resources**

8.4.1 On finances, the IA accompanying the proposals estimates the proposed changes to result in total costs of around €215m pa (€12m more than the status quo). The IA states that it is likely that this cost would be at least partly compensated by potential cost savings regarding spectrum management and extended market review periods so that the resulting total cost of this set-up would be similar to the status quo. However, this is predicated on the spectrum proposals being adopted and NRAs and Member States being willing to give up the cost saving of reduced market reviews to fund additional BEREC activity.

8.4.2 On resources, we are concerned that much of the (new) work of BEREC would be carried out by permanent agency staff, not hugely distinguishable from Commission officials (and consequently not drawing on from day-to-day experience regulating national markets). This would represent a shift away from BEREC's unique selling point of harnessing expertise rooted in national markets

8.4.3 The FCO have a clear position that any change to EU institutions should be "cost neutral", with any anticipated additional expenditure generated from efficiency savings within BEREC itself, rather than taking account of savings to Member States' administrative costs, such as those noted in paragraph 8.4.1.

#### **8.5 Wider proposals**

8.5.1 The Electronic Communications Code proposes to harmonise a minimum set of NRA competences, to correspond with BEREC's revised functions. This is intended to address concerns in some Member States, where certain core functions (e.g. around consumer protection) were "repatriated" into the relevant ministry, thereby undermining the NRA's ability to regulate effectively and to participate fully in BEREC.

8.5.2 The Commission proposes "enhancing" Radio Spectrum Policy Group (RSPG) and ("eventually") merging technical, professional and administrative support functions with the BEREC Office, so that RSPG "Office" can conduct technical studies as an input to Commission binding technical harmonisation decisions. This is an unnecessary level of bureaucracy. We support the idea of enhancing the RSPG as it is best placed to share best practice, but we believe that it should not be able to mandate or set rules. We would also oppose an enhanced role for RSPG that gives more power to the Commission. It is unclear what the benefit is of combining the RSPG with BEREC, and consider it to be a potential erosion of national competence.

### **9. CONSULTATION**

9.1 The Commission issued a consultation in September 2015, to which the government and many UK stakeholders responded. The consultation closed in December 2015.

9.2 The government has engaged with the regulator, Ofcom, and UK industry stakeholders at ministerial and official level, in order to formulate its policy positions. The Commission has set a very ambitious timetable for completion of the negotiations (end-2017 and Council Working Groups sessions have already started) so there is insufficient time to run a formal public consultation. We are instead augmenting our routine and regular



stakeholder engagement with stakeholder workshops and individual meetings to gather views specifically on the proposals.

## **10. IMPACT ASSESSMENT**

10.1 The Commission has produced an Impact Assessment to accompany these proposals and the proposals establishing the new EU Electronic Communications Code:

<https://ec.europa.eu/digital-single-market/en/news/proposed-directive-establishing-european-electronic-communications-code>

10.2 We have confirmed we do not need to produce a full domestic IA on all these proposals at this early stage. We will submit a comprehensive checklist of the European Commission's IA shortly. This checklist will focus on proposed amendments to the existing regulatory regime that may have a significant impact on business.

## **11. FINANCIAL IMPLICATIONS**

11.1 We will need to undertake some more analysis of the proposals before we can comment in full on the financial implications of these proposals. The Commission's Impact Assessment suggests the BEREC Office currently employs around 27 FTE personnel. These are professional staff supporting the expert work of the NRAs, but also supplying a BEREC administrative function.

11.2 The Impact Assessment includes an estimate of current costs of BEREC work for NRAs, the Commission and the BEREC office at around €203m p.a. The Commission sets out an assumption that under the proposals BEREC would require 60 FTE and NRAs contributions to working groups would increase by 20 FTEs. It is difficult to imagine that the net effect for NRAs of these new tasks would be a decrease in resource requirements.

## **12. TIMETABLE**

12.1 The Commission's proposals were published on 14th September 2016. The first Council Working Group took place on 22nd September 2016. Progress on the Code will be discussed at the Telecommunications Council on 2nd December 2017. The Commission has set a very ambitious target for conclusion of negotiations under the Estonian Presidency (July - December 2017), which would be followed by a standard eighteen month implementation period.

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**Rt Hon Matthew Hancock MP  
Minister of State for Digital and Culture**